No. 90-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT E. LEE, ET AL.,

Petitioners,

V.

DANIEL WEISMAN, ETC.,

Respondents,

On Appeal From the United States Court of Appeals for The First Circuit

BRIEF AMICUS CURIAE OF THE INSTITUTE IN BASIC LIFE PRINCIPLES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS IN THIS CASE

The Institute in Basic Life Principles is a not-for-profit educational organization. During the past twenty-six years, the Institute has conducted seminars in major cities throughout the United States and Canada, and more recently on an international scope with 2.3 million alumni who have attended through word of mouth recommendations.

Eleven years ago, the Institute began conducting seminars designed especially for judges, attorneys, and legislators. These seminars were requested by public officials to help them deal with the special pressures which they are experiencing in their marriages, families and finances as a result of the eroding moral foundations of our nation. It is because of a keen awareness of the tragic consequences that are resulting from the disinigration of the universal , non-optional principles upon which our country was based that the Institute has an interest of *amicus* in this case.

Indeed history is replete with documented accounts of civilization which have crumbled as a result of violating the universal principles that were understood by our Founding Fathers and incorporated into the fabric of our Constitution and law system.

The Institute's particular concern in this case involves the detrimental precedent and subsequent decisions that have resulted from the three-prong test created in *Lemon v. Kurtzman*[1] The Institute strongly supports the position of the petitioners and requests that this honorable Court consider how the *Lemon* test is a deviation from the Framer's intend and carries with it serious consequences for our nation.

I.

The Formation of the *Lemon* Test was an Aberration From the Framers' Intent

The *Lemon* test, which was created to interpret the Establishment Clause of the First Amendment, does not reflect the wisdom of the Founding Fathers. As a result, decisions that have subsequently relied upon the *Lemon* test to interpret the Constitution have inherited its deficiencies.

This Court has long recognized the need to consult history in reaching decisions on questions of law. "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."[2] Justice Brennan has noted that in interpreting the First Amendment there is an added responsibility to make sure that the decision is "one which

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[1] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[2] *Walz v. Tax Commission*, 397 U.S. 664, 679 (1970).

accords with history and faithfully reflects the understanding of the Founding Fathers."[3]

Although the *amicus* believes history clearly shows the intent of the Framers of the Establishment Clause, some Justices have questioned the use of history in this area of law, by claiming that historical evidence is too obscure. Justice Harlan once said, "the historical purposes of . . . the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged."[4] Justice Brennan has joined in this criticism of "Jurisprudence of Original Intention."[5] This "historic obscurity" doctrine, which engendered the *Lemon* test, was not formulated out of a desire to ignore the Framers' intent. Rather, it was formulated to fill a perceived void in our understanding of that intent. As stated in *Lemon*, the test was created "in absence of clear constitutional prohibitions" and from "cumulative criteria developed by the Court over many years."[6]

It is apparent that a test developed through admitted uncertainty of the Framers' intent should never supersede historical evidence that disproves the presuppositions on which it was formulated. As Justice Frankfurter has so aptly stated, ". . . the ultimate touchstone of constitutionality is the

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[3] *Abington v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

[4] *Flast v. Cohen*, 392 U.S. 83, 125 (1968) (Harlan, J., dissenting).

[5] "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as record of the ratification debates provide sparse or ambiguous evidence of the original intention." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985, p. 39.

[6] "The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. In absence of a precisely stated constitutional prohibition, we must draw lines with reference to the three main evils . . ." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Constitution and not what we have written about it."[7] In the words of Chief Justice Rehnquist, "no amount of repetition of historical errors in judicial opinions can make the errors true."[8]

If historical errors are found in the "cumulative criteria,"[9] that were relied upon in the forming of a test, the test and its criteria should be abandoned. Such is the case with the *Lemon* test. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[10] As Chief Justice Rehnquist has noted, the test should be discarded.

The purpose of this *amicus* is to bring to this Court's attention historic facts that seemingly were omitted in the creation of the *Lemon* test so that each of the three prongs can be analyzed to determine if they are consistent with the Framers' intent in the Constitution.

A. Secular Purpose

The *Lemon* Court relied on its earlier rulings [11] to conclude that an act with no secular purpose is violative of the Establishment Clause. "The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain . . . historical errors."[12]

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[7] *Graves v. New York ex rel.O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

[8] *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[10] *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

[11] As stated in *Lemon*, the test was developed from *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Abington v. Schempp*, 374 U.S. 203 (1963); and *Walz v. Tax Commission*, 397 U.S. 664 (1970).

[12] *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting).

Justice Brennan recently stated that "the test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for 'a union of government and religion tends to destroy government and degrade religion.' "[13]

The *Allen* decision states: "The test may be stated as follows: what [is] the purpose . . . of the enactment? If [it is] the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose . . . that neither advances nor inhibits religion."[14]

The Framers of the the Establishment Clause did not intend to prohibit legislative acts that lacked a secular purpose. In 1789, the first President of the United States and the president of the Constitutional Convention, proclaimed a national day of thanksgiving urging the nation to offer:

> . . . prayers and supplications to the great Lord and Ruler of nations, and beseech Him to pardon our national and other transgressions . . .

President Washington then went on to exhort the newly formed government to:

> . . . promote the knowledge and practice of true religion and virtue . . .[15]

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[13] *Lynch v. Donnelly*, 465 U.S. 668, 699 (1984) (Brennan, J., dissenting) quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

[14] *Board of Education v. Allen*, 392 U.S. 236, 243 (1968).

[15] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Vol. I (Washington D.C.: Bureau of National Literature and Art, 1901), p. 64.

As this Court has well stated, the First Congress ". . . was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."[16] The fact that the Proclamation was in response to a request of the First Congress, the day after the First Amendment was proposed is indicative of their intent for the Establishment Clause.

It is undeniable that there is no secular purpose for urging the nation to pray and repent of sin and for urging the government to promote religion and virtue. Had this Court used the *Lemon* test in 1789 to determine the constitutionality of President Washington's Proclamation, it would have come to the preposterous conclusion that in absence of a secular legislative purpose, the Framers of the Establishment Clause had violated the very Establishment Clause they had written.

In *Lynch* this Court noted that "[a] significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate."[17]

It is apparent that the Framers of the Bill of Rights interpreted the Establishment Clause much more permissively than has this Court in recent years. They obviously considered a significant amount of religious affirmation in and by government to be consistent with the First Amendment.

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[16] *Myers v. United States*, 272 U.S. 52, 174-175 (1926) See also *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

[17] *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984).

> It can hardly be thought that in the same week Members of the First Congress, who voted to appoint and pay a chaplain for each House and also approved the draft of the First Amendment for submission to the states, intended the Establishment Clause of the Amendment to forbid what they just declared acceptable.[18]

This interpretation of the Establishment Clause is not limited to its Framers, nor is it limited to the Eighteenth Century. Decades after its creation, this Court clearly recognized that the Establishment Clause is not a prohibition of government endorsement of religion. In 1844, this Court ruled in a case called, *Vidal v. Girard's Executors* which involved the bequest of an estate worth over $7 million to the city of Philadelphia for constructing an orphanage. The bequest, however, stipulated that "no ecclesiastic, missionary or minister of any sect whatsoever shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises. . . my desire is, that all the instructors and teachers in the college shall take pains to instill in the minds of the scholars the purest principles of morality . . ."[19]

The Court ruled that this stipulation could not be followed because the teaching of morality is inseparable from the teaching of Christianity:

> The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith—the Bible. [20]

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[18] *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

[19] *Vidal v. Girard's Executors*, 43 U.S. 127, 133 (1844).

[20] *Vidal v. Girard's Executors*, 43 U.S. 127, 153 (1844).

The presupposition that history is so obscure that purposes intended by the Establishment Clause cannot be clearly seen, should not be used as an excuse for open and blatant perversion of the Framers' intent. The undisputable facts of history demonstrate that the first prong of the *Lemon* test—requiring that government action maintain a secular purpose , contradicts the Framers' intent and thus should be abandoned.

B. Primary Effect

The second prong of the *Lemon* test, often called the primary effect prong, prohibits government action having the primary effect of endorsing religion. Like the first prong, the primary effect prong also finds its basis in *Allen*, which draws from *Everson* and *Abington*.[21] In *Everson*, Justice Rutledge stated that the Framers intended "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[22] This presupposition, which is devoid of both historical documentation and legal precedent, was soundly refuted by Justice Goldberg in *Abington*:

> As a matter of history, the First [A]mendment was adopted solely as a limitation upon a newly created National Government. The events leading to its adoption strongly indicate that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.[23]

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[21] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[22] *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting).

[23] *Abington v. Schempp*, 374 U.S. 203, 373-374 (1963) (Goldberg, J., concurring).

James Madison's initial proposal sheds light on his intentions for the Establishment Clause.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed. [24]

The Senate proposed the following versions:

> Congress shall not make any law infringing the rights of conscience or establishing any religious sect or society.
>
> Congress shall make no law establishing any particular denomination of religion in preference to another . . .
>
> Congress shall make no law establishing one religious society in preference to others . . .
>
> Congress shall make no law establishing religion . . .
>
> Congress shall make no law establishing articles of faith or a mode of worship . . . [25]

Finally a Conference Committee agreed on the following wording:

> Congress shall make no law respecting an establishment of religion . . . [26]

It is clear from these proposed amendments that it was not the intent of the Framers to bar religious observance and endorsement by creating a "wall of separation" between church and state. Rather, the purpose of the Establishment Clause, as clearly seen by its history, was to prohibit the establishment of a national religion.

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[24] Edwin S. Gaustad, *Faith of Our Fathers*, pp. 157-158.

[25] *Id.*

[26] *Id.*

Madison's proposed amendment was opposed during debate in the House of Representatives. "Mr. Sherman thought the Amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments . . ."[27] Madison's response disproves the theory that he and the Framers intended to do more than bar the creation of a state religion:

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. [28]

Justice Joseph Story, who was appointed by the architect of the First Amendment, James Madison, stated that:

> [T]he real object of the First Amendment was not to countenance, much less advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy the exclusive patronage of the national government.[29]

The "separation doctrine" contravenes the intent of the Framers and the jurisprudence found in such cases as *Zorach v. Clauson*.[30] In *Zorach*, this Court stated that because our nation is made of . . .

> religious people whose institutions presuppose a Supreme Being . . . [W]hen the state endorses and

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[27] *Annals of Congress*, Vol. I, p. 730.

[28] *Id.*

[29] Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed., Vol II, Sec. 1877, p. 594.

[30] See *Zorach v. Clauson*, 343 U.S. 306 (1952).

> encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their special needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." [31]

The *Zorach* Court recognized that to prevent a "callous indifference," government must condone and endorse religion. Without overruling or distinguishing *Zorach*, this Court in *Engel v. Vitale* stated that a "union of government and religion tends to destroy government and degrade religion."[32]

The Establishment Clause was not designed to bar government from endorsing religion, but rather, as Chief Justice Rehnquist has noted, it "forbade establishment of a national religion, and forbade preference among religious sects or denominations." [33] The second prong of the *Lemon* test is simply a creation of this Court in the last 50 years and is devoid of any historical foundation.

Any attempt to portray the Framers' intentions in the Establishment Clause as motivated by a desire to form a wall of separation between government and religion is soundly refuted by these facts. It is clear that the second prong of the *Lemon* test prohibiting the primary effect of an act from advancing religion, contravenes the intention of the Framers.

C. Excessive Entanglement

By its very name, the third prong of the *Lemon* test is a criterion of degrees. As this Court noted in *Lemon*, "total separation is not possible in an absolute sense. Some relationship between government and religious organizations

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[31] *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

[32] *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

[33] *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

is inevitable."[34] The third prong of the *Lemon* test finds its origins in *Walz v. Tax Commission*.[35]

However, this basis and interpretation of excessive entanglement bears no affinity to the Court's later ruling that a high impregnable wall be erected between church and state. In *Walz* this Court stated that taxing a church violates the First Amendment because it would foster "excessive government entanglement with religion."[36]

This jurisprudence of "limited separation" found in *Walz* was later reiterated by this Court in *Lynch*:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . ." Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. [37]

That the Framers intended for government to accommodate rather than tolerate religion is undeniable from the following observations by the Founding Fathers which are indicative of their definition of "excessive entanglement" of church and state:

George Washington—"Whereas, it is the duty of all nations to acknowledge the Providence of Almighty God, to obey His will, to be grateful for his benefits, humbly to implore his protection and favor . . ."[38]

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[34] See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

[35] See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

[36] *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

[37] *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) quoting *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

[38] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, Vol. I, p. 64.

"Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens."[39]

John Jay—"The most effectual means of securing the continuance of our civil and religious liberties is, always to remember with reverence and gratitude the source from which they flow."[40]

James Madison—". . . the belief in God All Powerful wise and good, is so essential to the moral order of the World and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources nor adapted with too much solicitude to the different character and capacities to be impressed with it."[41]

These quotes explain why the First Congress, which wrote and ratified the Bill of Rights, saw no deviation from the Constitution when they ratified Article III of the Northwest Ordinance on September 25, 1787, the very same day they ratified the First Amendment.[42]

> Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[43]

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[39] Washington, Farewell Address, September 17, 1796.

[40] John Jay to the Committee of the Corporation of the City of New York, June 29, 1826; quoted by William Jay, *Life of John Jay*, I:457-58.

[41] Smylie, James H., *Madison and Witherspoon: Theological Roots of American Thoughts*,.p. 125.

[42] *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

[43] Andrew, W. Israel, *Manual of the Constitution of the United States., App. 13.*

Had the *Lemon* test been used to rule on the constitutionality of this act, the inevitable conclusion would be that the First Congress passed a bill that violated the First Amendment on the very same day that the First Amendment was proposed.

It is clear that what the *Walz* Court defined as excessive entanglement, the taxation of church property, has evolved into a constitutional test that is far from the Framer's intentions and has become an instrument to subvert religious expression.

Thomas Cooley's interpretations of the amendment is much closer to the Framer's intent:

> But while thus careful to establish religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet in finite and dependent beings.[44]

For these reasons, the Institute in Basic Life Principles respectfully asks that this Court re-examine the *Lemon* test in light of the Framer's intent.

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[44] Thomas M. Cooley, *Constitutional Limitations*, Chap. XIII, p. 470.

II.

Jurisprudence Since the Formation of the *Lemon* Test has Resulted in Rulings that are Restrictive of Religious Freedom.

The Court in *Zorach v. Clauson*, predicted that if the First Amendment was interpreted to mean that "in every and all respects there shall be a separation of Church and State," the result would be a relationship in which "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly." [45] After that prediction in 1952, history clearly demonstrates that the "wall of separation" has fostered unfriendly relationships between church and state.

Not only has the *Lemon* test created adversity between religion and state, it has done little to accomplish its purposes of creating uniform criteria that would lead to consistency in its decisions.

As noted by Chief Justice Rehnquist, "the wall idea might have served as a useful, albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; . . . since *Everson* our Establishment Clause cases have been neither principled nor unified." [46]

The result of this "misguided analytical concept," the Chief Justice explains, is that "recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred,

[45] *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

[46] *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.' " [47]

"[T]he *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [48]

"[N]o amount of repetition of historical errors in judicial opinions can make the errors true. The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless a guide to judging. It should be frankly and explicitly abandoned."[49]

Finally, in *Marsh v. Chambers*,[50] the Court declined to apply the *Lemon* test in ruling that prayer by a legislative chaplain did not violate the Establishment Clause. In his dissent, Justice Brennan agreed with the lower court's conclusion that all three prongs of the *Lemon* test had been violated:

> In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional. [51]

In effect the Court was faced with a decision to either 1.) apply the *Lemon* test and strike down an act as

[47] *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

[48] *Id.* at 108.

[49] *Id.* at 108.

[50] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[51] *Id.*, at 801-802 (Brennan, J., dissenting).

unconstitutional that the Framer's clearly condoned themselves, or 2.) abandon the *Lemon* test to uphold a practice that had overwhelming historic foundations. By following the latter alternative, the Court upheld the intent of the Framers and demonstrated the fact that the *Lemon* test is unreasonable and contradictory of the Framers' intent.

Like the *Marsh* decision, application of the *Lemon* test creates a dilemma for this Court because it must ignore its own test in order to accomplish its goals of interpreting the Constitution. The fact that this Court in subsequent decisions has declined to apply the *Lemon* test because the effect of its application would clearly run afoul of its very goals, is further reason to discard this restrictive test and replace it with a more reasonable criterion.

As the Chief Justice states in *Wallace*, the *Lemon* Court, "attempted to add mortar to *Everson's* wall through the three-part test of *Lemon v. Kurtzman* . . . Thus the purpose and effect prongs, have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters."[52]

The Institute in Basic Life Principles agrees with the Chief Justice's analysis and urges along with him that the *Lemon* test "frankly and explicitly be abandoned."[53]

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[52] *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting).

[53] *Id.* at 108 (Rehnquist, J., dissenting).

CONCLUSION

In the case at bar, the decision of this Court hinges on the choice of whether to consult the Framers' intent, in which case the lower court's ruling would be overturned, or to follow the *Lemon* test, in which case the lower court's ruling would be upheld. The result of application of the *Lemon* test in this case further proves that the *Lemon* test, while claiming to protect society from government entanglement with religious affairs, in effect, restricts, rather than protects, religious liberty. The Institute in Basic Life Principles urges that this Court follow the intent of the Framers and overturn the decision of the lower court.

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